89-1289

No. _____

Supreme Court of the United States

CHARLES F. CHAPMAN

Petitioner

v.

HOMCO, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
For The
FIFTH CIRCUIT

Frank P. Hernandez
(Counsel of Record)
4319 Oak Lawn
Dallas, Texas 75219
(214) 520-7686

QUESTION PRESENTED

1. IS A SUBSEQUENT DESCRIMINATORY ACT BY THE EMPLOYER, AFTER THE DATE OF TERMINATION OF THE EMPLOYEE, THE DATE FOR THE STATUTE OF LIMITATIONS TO COMMENCE UNDER THE ADEA.

PARTIES

Charles F. Chapman, Petitioner-Plaintiff

HOMCO, INC., Respondent-Defendant

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No. _____

Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
For The
FIFTH CIRCUIT

Charles F. Chapman petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment for the Court of Appeals was issued on October 23, 1989. Chapman vs. Homco Inc., 886 F.2d 756 (5th Circuit 1989).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 23, 1989. (Apendix B) The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT

Petitioner filed his Original Complaint as a civil action in the Northern District of Texas alleging violation of the Age Discrimination in Employment Act. Respondent filed a Motion for Summary Judgmenton September 30, 1988 and Petitioner properly filed a response with the attached affadavit of the Petitioner. Filed before the District Court were seven (7) depositions which were considered by the district court as part of the summary judgment evidence. On December 13, 1988 the district Court entered it's Memorandum Opinion and Order and a Judgment holding that the Plaintiff did not file suit within the two (2) year statute of limitation which governs ADEA action as

applied in the Portal-to-Portal Pay Act, 29 U.S.C. Sec. 255, as adopted by the ADEA in 29 U.S.C. Sec. 626(e)(1). (Apendix A). Petitioner appealed the district court jugment to the United States Court of Appeals for the Fifth Circuit, who in a *PER CURIUM* opinion affirmed the judgment of the district court. Chapman vs. Homco Inc., 886 F.2d 756 (5th Cir. 1989). (Apendix B).

REASONS FOR GRANTING THE WRIT

This case concerns itself with the date that the two (2) year statute of limitation commences to run on a plaintiff's cause of action under the ADEA.

The undisputed facts as relates to the statute of limitation issue show that Petitioner was informed of his termination on January 11, 1986, and was advised he was being terminated because of his job performance.

On January 13, 1986, respondent posted a Memorandum for it's employees to be informed about Petitioner's employment status indicating that the Petitioner had resigned his position as of January 13, 1986. (Apendix C).

Respondent continued to pay Petitioner his full salary until March, 1986.

Respondent hired Petitioner's replacement, a man younger by fifteen (15) years, approximately three (3) weeks after petitioner had been advised of his termination on January 11, 1986.

At the time of his termination, Petitioner was not informed that age was a factor in his termination.

Petitioner discovered the false letter of resignation and the age of his replacement a few weeks after he had been terminated and at that point "came to believe" that he had been terminated because of his age. (Apendix D)

The Fifth Circuit relied on Delaware State College vs. Ricks, 449 U.S. 250, 257-59, 101 Sup. Ct. 498, 503-05, 66 L.Ed.2nd 431 (1981) and held that the statute of limitations begins to run when the employee is notified that his employment is terminated. In addition, the Fifth Circuit relied upon it's opinion in Merrill vs. Southern Methodist University, 806 F.2d 600 (5th Cir. 1986), to support the conclustion that the tolling of the statute of limitations was inapplicable under the facts of this case. The Fifth Circuit Court in Merrill rejected Plaintiff's argument that the statute of limitation in a Title VII case should not begin to run until the date of discovery of the alleged discriminatory practices and concluded that the reason behind Merrill was sufficiently anologous to Petitioner's case to support the conclusion that tolling of the statute was inappropriate.

The Fifth Circuit opinion is directly in conflict with the Ninth Circuit's opinion in Arosen vs. Crown Zellerbock, 662 F.2d 584 (9th Cir. 1981), *cert denied* 103 Sup. Ct. 1183 (1983).

Petitioner's case is different than Ricks because here the employer continued the illegal act of discriminatory termination by falsly stating in it's Memorandum to it's other employees that

the Petitioner had resigned his position. Therefore, the last illegal act was January 13, 1986, and not the date of Petitioner's termination on January 11, 1986. Petitioner was falsely mislead by the employer when he was informed that his termination was because of poor job performance. Since Petitioner did not receive notification of the real reason for his termination at the time of his termination on January 11, 1986, and since the employer continued the illegal discriminatory act by posting a false Memorandum relating Petitioner's termination, the statute of limitation did not commence to run until at least January 13, 1986. Therefore, Petitioner filing his original complaint in the district court on January 13, 1988, was timely.

Petitioner contends that the applicable starting time of limitations in his case is some three weeks after January 11, 1986, because that is when he actually became aware of his employer's deceptive discriminatory acts. Although the reason for the false posting of the resignation Memorandum is not clear, the fact that it was posted is clear. Petitioner contends that his employer mislead him by falsely advising him at his termination that he was being terminated for poor job performance. Also, Petitioner, contends that his employer was attempting to protect itself from future litigation by posting the false resignation Memorandum when Petitioner had not asked that it be posted nor had he been given an opportunity to resign. Petitioner contends that this action is evidence of his employer's attempt to hide it's true motive and that he was reasonable in relying on the

statements made to him at his termination to not be aware that an illegal act was being committed at the time of his termination on January 11, 1986.

The District Court relied upon O'Connell vs. Champion Intern. Corp., 812 F.2d 393 (8th Circuit 1987) to determine the legal issue that a claim accrues at the time the employee receives notice of termination. However, in O'Connell the Eighth Circuit was correct when it stated, at 394:

> The period runs from the time the defendant takes the allegedly discrimina-tory actions and the plaintiff learns of them. See Delaware State College v. Ricks, 449 U.S. 250, 258, 101 Sup. Ct. 498, 504, 66 L.Ed.2d 431 (1980). The period ends when the plaintiff "commences" his actions. 29 U.S.C. Sec. 255.

Therefore, since Petitioner discovered the illegal nature of Homco's actions in terminating him a few weeks after his termination, the statute of limitations did not commence to run until he learned of his employer's illegal actions.

This court in Chardon v. Fernandez, 102 Sup. Ct. 28 (1981) in commenting upon Ricks and the proper focus for determining the onset of the statute of limitations, commented at 29:

> In Ricks, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. 449 U.S., at 258, 101 S. Ct., at 504. The fact of termination is not itself a illegal act. In Ricks, the alleged illegal act was racial discrimnation in the tenure decision. Id., at

> 259, 101 S. Ct. at 504. Here, respondent's alledge that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in Ricks or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. As we noted in Ricks, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimnation." Id., at 257, 101 S. Ct. at 504.

In applying Chardon to Petitioner's case Petitioner would concede that the fact that he was kept on the payroll until March would not prolong the life of his cause of action for employment discrimination. However, unlike Ricks and Chardon, Homco continued the illegal act subquent to the date on which the decision to terminate was made and subsequent to the date that Petitioner was advised and notified of his termination. The posting of the false resignation Memorandum continued the discriminatory act until at least January 13, 1986. Therefore, Petitioner's Original Complaint filed on January 13, 1988, was timely under the ADEA.

CONCLUSION

Petitioner moves the court to grant the Writ of Certiorari, vacate the Judgment of the Court of Appeals and declare that Petitioner timely filed his original complaint within the two year statutory limit for filing an ADEA action.

Respectfully submitted,

Frank P. Hernandez
Bar No. 09516000

LAW OFFICES OF
FRANK P. HERNANDEZ
4319 OakLawn
Dallas, Texas 75219
(214) 520-7686

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to Roberr E. Luxen and David T. Fenton at GARDERE & WYNNE Attorneys at Law, Dallas, Texas.

AFFIDAVIT OF COUNSEL AS TO MAILING OF WRIT OF CERTIORARI

I, Frank P. Hernandez, counsel for Charles F. Chapman, Petitioner, swear that the foregoing petition was deposited in the United States Mail with the proper postage, prepaid on January _____, 1990.

Frank P. Hernandez

State of Texas §
§
County of Dallas §

Sworn to and Subscribed before me a Notary Public by said Frank P. Hernandez on this _____ day of January, 1990 to which wit..ess my hand and seal.

_____
Notary Public in and for
The State of Texas

My commission expires: _____

APENDICE

APPENDIX A

IN THE UNITED STATES DISCTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES F. CHAPMAN	§	
	§	
Plaintiff	§	
	§	Civil Action
V.	§	No. 3-88-0113-H
	§	
HOMCO, INC.	§	
	§	
Defendant	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant's Motion for Summary Judgment, filed September 30, 1988; Plaintiff's Response filed October 20, 1988; and Defendant's Reply, filed October 26, 1988.

This age discrimination action arises from Plaintiff's discharge from employment on January 11, 1986. In his Complaint filed January 13, 1988, Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§ 1343(4), 2201, 2202, and 42 U.S.C. § 200e et seq. Such jurisdiction is pled "to secure protection of and to redress deprivation of rights secured by the Age Discrimination in Employment Act of 1967 ["ADEA"]..." Plaintiff's Complaint at 3; see 29 U.S.C. § 636 et seq. In his prayer for relief, Plaintiff refers only to the ADEA.[1]

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1. Plaintiff also notes that he "received correspondence from the Equal Employment Opportunity Commission ["EEOC"]

Plaintiff was hired by Defendant in November 1973. At the time, Plaintiff was 43 years old. In August of 1981, Plaintiff was promoted to the position of supervisor and reported to Ron Kinney, Vice President of Operations. When Plaintiff was promoted, Kinney expressed concern about Plaintiff's ability to handle the position.[2] Defendant's Brief at 1-2.

Kinney was not satisfied with Plaintiff's efforts as a supervisor. A number of employees complained to Kinney that the Plaintiff displayed favoritism and discriminated against employees on the basis of race. Kinney Aff. at 1-3. After several incidents in which Plaintiff allegedly behaved unprofessionally[3], Kinney discharged Plaintiff. Defendant's Brief at 6.

Defendant moves for summary judgment, claiming that: 1) Plaintiff's suit is barred under the ADEA's statute of limitations; 2) Plaintiff has failed to establish a prima facie case of age discrimination; and 3) that Defendant had legitimate non-discriminatory reasons for discharging Plaintiff.

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advising him that he could file suit under the ADEA." Plaintiff's Complaint at 2. Plaintiff does not provide the Court with a copy of this correspondence nor does Plaintiff plead that the EEOC granted Plaintiff the right to bring a Title VII cause of action.

[2] Plaintiff specifically recalls Kinney warning him that he (Plaintiff) would have to be much tougher as a supervisor than he had been as a group leader. Chapman Dep. at 33.

[3] This behavior included Plaintiff engaging in water pistol fights with certain of his employees, throwing confetti-filled eggs in the work area, and wearing a brassiere over his cloths through the plant on one occasion. Defendant's Brief at 19.

Summary Judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A movant for summary judgment need not support his motion with evidence negating his opponent's case. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). Summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. Celotex, 477 U.S. at 324-26.

1. The Substantive Case

Defendant argues that even if Plaintiff were successful in establishing a prima facie case of age discrimination, Defendant could defeat such a case. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court formulated a three part evidentiary procedure for discrimination cases. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (applying McDonnell Douglas test in age discrimination case). First, the plaintiff must establish a prima facie case. Burdine, 450 U.S. at 252-3. Once the prima facie case is established, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. Finally, the plaintiff must prove with substantial evidence that the non-discriminatory or non-retaliatory reasons offered by the defendant are not the true

reasons for this actions, but merely a pretext. Burdine, 450 U.S. at 253; Reeves v. General Foods Corp., 682 F.2d 515, 521 (5th Cir. 1984).

Defendant has described the factors that contributed to Kinney's unfavorable evaluation of Plaintiff's performance.[4] When an employer articulates legitimate, non-discriminatory reasons for a termination decision, the presumption of discrimination engendered by the prima facie case is dispelled. Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1983).

At this point, Plaintiff's burden of showing pretext merges with his burden of establishing that "but for" his age he would not have been discharged. Burdine, 450 U.S. at 256. Plaintiff argues that a number of employees have testified that Plaintiff displayed no favoritism nor did he discriminate against others. Plaintiff's Response at 5 (citing Hubbard Dep. at 27-28, Samuels Dep. at 32-

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4 Defendant also describes one incident of insubordination that stemmed from Plaintiff's romantic involvement with one of Defendant's employees. Defendant's Brief at 4-6, 21.

While the Court has summarized Defendant's reasons for discharging Plaintiff, the Court acknowledges that it is not the Court's role to question whether the decision to discharge Plaintiff reflected an accurate or wise assessment of his abilities. Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1182 n.7 (6th Cir. 1983); see also Bienkowski v. American Airlines, 851 F.2d 1503, 1507-08 (5th Cir. 1988) ("The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers.").

34, Villarreal Dep. at 32-34). Additionally, Plaintiff states that he was replaced at Homco by a younger man. See Kinney Aff. at 6.

It is this Court's determination that arguments made in Plaintiff's Response do not satisfy the final McDonnell requirement. As the Supreme Court noted in Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986), "The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Plaintiff has not provided evidence to establish that "but for" his age, Plaintiff would not have been discharged.

Despite Plaintiff's failure to carry his burden, Defendant provides the Court with additional information to further bolster its motion. Defendant explains that eight of eleven management employees at Homco on the date that Plaintiff was discharged were over 40 years of age. Kinney Aff. at 6. Seven of the nine management employees currently at Homco are over 40 years of age. Two of these are in their fifties and one is in his sixties.

Since 1980, the year that Homco was purchased by its current owners, Homco has terminated seven employees other than Plaintiff. All of these were hourly, non-supervisory staff and only one was over the age of 40 years of age when discharged. Finally, the individual who ultimately replaced Plaintiff was over 40 years of age when he was hired. Kinney Aff. at 6-7.

In light of the above facts, the Court finds that Plaintiff has not established the necessary elements of a case of age

discrimination. Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

2. ADEA Statute of Limitations

Even if Defendant had not been successful with its Motion on the merits, the Court would alternatively grant summary judgment because Plaintiff's claims are time-barred. In this response to Defendant's statute of limitations argument, Plaintiff states, "However, this case involved Title VII and Sec. 1981 [42 U.S.C. § 1981] claims, not claims of age discrimination under the ADEA." Plaintiff's Response at 3 (emphasis added). This statement directly contradicts Plaintiff's Complaint, wherein Plaintiff alleges that the EEOC gave Plaintiff permission to file suit under the ADEA. Plaintiff's Complaint at 2.

In 29 U.S.C. § 626(e)(1) the ADEA adopts the statute of limitations set forth in the Portal-to-Portal Act, 29 U.S.C. § 255. Section 255 provides that an action "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

A cause of action accrues under the ADEA on the date the allegedly unlawful discriminatory act occurs. EEOC v. Kimberly-Clark Corp., 531 F. Supp. 58, 61 (N.D. Ga. 1981) (citing Chardon v. Fernandez, 454 U.S. 6, 7-8 (1981); Delaware States College v. Ricks, 449 U.S. 250, 257-59 (1980). In a case alleging an

unlawful discharge, the statute of limitations commences when the employee is notified that his employment is to be terminated.[5] Kimberly-Clark, 531 F. Supp. at 61; see Ricks, 449 U.S. at 259.

The Plaintiff was discharged on January 11, 1986. He did not file suit until January 13, 1988. Thus, the two year statute of limitations period expired before Plaintiff filed his Complaint. Plaintiff did not allege a willful violation of the ADEA in his Complaint so the three year period does not apply. Accordingly, Plaintiff's ADEA claims are DISMISSED as they are time-barred.

3. Potential Title VII, Section 1981 Claims

Certainly Plaintiff is free to seek relief under both Title VII and 42 U.S. C. § 1981, although neither addresses the issue of age discrimination as does the ADEA. Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975).[6] The Fifth

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[5] Plaintiff contends that the statute of limitations does not begin to run until "the employee knows or should know that an unlawful employment practice has been committed." Aronsen v. Crown Zellerbach, 662 F.2d 584, 593 (9th Cir. 1981); but see O'Connell v. Champion Intera. Corp., 812 F.2d 393, 394 (8th Cir. 1987) (claims accrued at time employees received notice of termination).

[6] Quoting Congress, the Court noted "that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of th Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the procedures augment each other and are not mutually exclusive." 421 U.S. at 459.

Circuit has determined, however, that a court may focus on the Title VII claim alone when identical facts support the § 1981 claim. The Court stated that:

> specific consideration of these alternate remedies [including a § 1981 claim] for employment discrimination is necessary only if their violation can be made out on grounds different from those available under Title VII. See Watson v. Ft. Worth Bank & Trust, 798 F.2d 791, 794 n.4, (5th Cir. 1986)[7]; Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n. 4 (5th Cir. 1982); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980). Because Parker has not asserted any such distinction here, we give specific consideration only to her Title VII claim."

Parker v. Mississippi State Dept. of Public Welfare, 811 F.2d 925, 927 n.3 (5th Cir. 1987).

The Court notes that there are two procedural prerequisites to the prosecution of a Title VII claim. First, a charge must be filed with the EEOC within 180 days of the alleged unlawful employment practice, or within 300 days if the proceedings are initially instituted with a state or local agency. 42 U.S.C. § 2000e-5(e); see EEOC v. Commercial Office Products Co., 108 S. Ct. 1666, 1667 (1988). The Supreme Court has concluded that this filing period is not a jurisdictional requirement, "but a requirement that, like a statute of limitations, is subject to waiver, estoppel and

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7 vacated and remanded (on other grounds), 108 S.Ct. 277 (1988).

equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Cruce v. Brazosport Independent School District, 703 F.2d 862, 863 (5th Cir. 1979).

Second, the civil action must be brought within 90 days after receipt of the right-to-sue letter from the EEOC. 42 U.S.C. §2000e-5(f)(1). Language in the Zipes opinion indicates that its holding applies to this second prerequisite as well. See Zipes, supra, 455 U.S. at 398; Gonzalez-Allen Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983). See also Mohasco Corp. v. Silver, 477 U.S. 807, 811 (1980); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 593 n.15 (5th Cir. 1981).

Given the above facts and title VII filing deadlines, any Title VII claim that the Plaintiff might bring is also time-barred. Additionally, Plaintiff has asserted no reason why the filing requirements and the limitations period are waived or tolled.[8] Accordingly, Plaintiff's Title VII and § 1981 claims are DISMISSED.

In sum, Defendant's Motion for Summary Judgment is GRANTED. Plaintiff's ADEA, Title VII, and § 1981 claims are DISMISSED.

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[8] Even if Plaintiff could assert a separate claim under § 1981, it too would be untimely and barred by the applicable statute of limitations. A lawsuit under § 1981 must be brought within two years of the complained event. Price v. Digital Equipment Corp., 846 F.2d 1026, 1028 (5th Cir. 1988) (per curiam). As discussed previously, Plaintiff did not file this suit until more than two years after his discharge.

SO ORDERED.

DATED: December 12, 1988.

SIGNED BY BAREFOOT SANDERS
ACTING CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISCTRICT COUR
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES F. CHAPMAN	§	FILED DEC. 13, 1988
	§	BY NANCY DOHERTY,
Plaintiff	§	CLERK
	§	Civil Action
V.	§	No. 3-88-0113-H
	§	
HOMCO, INC.	§	ENTERED ON DOCKET
	§	12-13-88 PURSUANT TO
Defendant	§	F.R.C.P. RULES 58 AND 79A

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated December 12, 1988.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff Chapman take nothing by his suit against Defendant Homco, Inc., and that this suit be, and it is hereby, DISMISSED on the merits at Plaintiff's cost.

SIGNED this 12th day of December, 1988.

SIGNED BY BAREFOOD SANDERS
ACTING CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX B

Charles F. CHAPMAN

Plaintiff-Appellant,

v.

HOMO, INC., Defendant-Appellee.

No. 89-1055.

United States Court of Appeals,

Fifth Circuit.

October 23, 1989.

Former employee appealed from order of the United States District Court for the Northern District of Texas, Barefoot Sanders, J., 708 F.Supp. 787, which dismissed age discrimination action. The Court of Appeals held that action was time barred despite employee's claim that he was not aware of the discriminatory reasons for the discharge until several weeks after the discharge.

Affirmed.

Limitation of Actions 95(15)

Age discrimination action was time barred where it was brought more than two years after discharge, despite employee's

claim that he was not aware until several weeks after his discharge that the termination was based on discriminatory factors. Age Discrimination in Employment Act of 1967, § 7(e)(1), 29 U.S.C.A. § 626(e)(1); Portal-to-Portal Act of 1947, § 6, 29 U.S.C.A. §255.

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, WILLIAMS, and GARWOOD, Circuit Judges.

PER CURIAM:

Charles Chapman appeals from the summary judgment dismissal of his age discrimination suit. 708 F.Supp. 787. Because we conclude that the district court correctly determined that the complaint was time-barred, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Homco, a company engaged in the manufacture of finished wood products, hired Chapman as a group leader in 1973 at the age of forty-three. Prior to his employment with Homco, Chapman had no manufacturing experience. In 1981, Chapman was promoted from group leader to supervisor. Ronald Kinney, Homco's Vice-President in Charge of Operations, became

Chapman's immediate supervisor and the individual who was responsible for evaluating Chapman's performance. According to Homco's evidence in support of its motion for summary judgment, Kinney expressed reservations about Chapman's abilities to serve in a supervisory capacity. In fact, Kinney tried unsuccessfully to bring in a supervisor from Syroco, Inc., then Homco's parent corporation. Kinney Affidavit at 2.

Kinney's hesitation about Chapman's supervisory skills stemmed from Chapman's on the job behavior. Chapman admitted that he "cut up" at work. Specifically, Homco has pointed out that Chapman was known to engage in water pistol fights, to throw confetti eggs, and to walk through the workplace with a bra worn over his clothes. Chapman also tended to favor some employees over others. The employee absenteeism rate was the highest in Chapman's department.

Additionally, in 1979 or 1980, Chapman began a romantic relationship with Cathy Prince, another employee, who was under Chapman's supervision after his promotion. Kinney spoke to Chapman about the ramifications of supervising a woman with whom Chapman was romantically involved. After Prince and another female employee had an argument, Chapman asked Kinney not to discipline Prince. Kinney ultimately concluded that a mistake had been made in promoting Chapman. Kinney spoke with Chapman, and expected him to resign. When Chapman did not do so, Kinney discharged him.

Chapman alleges that he was terminated on January 11, 1986, without any warning. He asserts that he realized that the termination was motivated by discriminatory factors two weeks later when he became aware that his replacement was a much younger man. On October 16, 1986, Chapman filed a complaint with the EEOC. After receiving a right-to-sue letter, Chapman filed this complaint on January 13, 1988.

There is no dispute that January 11, 1986, is the date of the termination as well as the date of the last alleged discrimination event. Based on this fact, the district court granted Homco's motion for summary judgment on the ground that the claim was time-barred. Alternatively, the district court concluded that Chapman had failed to allege facts sufficient to establish the existence of an essential element of his claim. Because we conclude that the district court's dismissal on prescription grounds was proper, this Court need not address the alternative ground.

II. DISCUSSION

The Age Discrimination in Employment Act, 29 U.S.C. § 626(e)(1), adopts the statute of limitations set out in the Portal-to-Portal Pay Act.[1] Consequently, a two-year statute of limitations applies to the instant case.[2]

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1. 29 U.S.C. § 255. This section provides that an action "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising

It is undisputed that Chapman was terminated on January 11, 1986. It is also undisputed that Chapman filed his complaint on January 13, 1988, more than two years after the date that Chapman was notified of his discharge. Even so, Chapman argues that his claim is not time-barred. Rather, he contends that he was not aware that the termination was based on discriminatory factors until several weeks after the termination. Consequently, Chapman urges this Court to conclude that the cause of action accrued at the time of his discovery rather than at the time of discharge.

Chapman's argument is not convincing. The limitations period applicable to an action brought under the ADEA begins to run at the time that the alleged unlawful discriminatory act occurred and the plaintiff was so notified. When a plaintiff alleges an unlawful discharge, the statute of limitations begins to run when the plaintiff is notified that his employment is terminated. Delaware State College v. Ricks, 449 U.S. 250, 257-59, 101 S.Ct. 498, 503-05, 66 L.Ed.2d 431 (1981).[3] In this case, the date is January 11, 1986.

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out of a willful violation may be commenced within three years after the cause of action accrued."

2. Chapman does not allege a willful violation of the Act.

3. Although Ricks involved a claim brought under Title VII, this Circuit has concluded that the Supreme Court's analysis of the limitations question applies to ADEA actions as well. See, e.g., Clark v. Resistoflex Co., 854 F.2d 762 (5th Cir. 1988).

Chapman asserts that, though he knew he was discharged on January 11, he did not understand that his discharge had been discriminatory until sometime after that date. He argues that the statute of limitations period must be tolled until the date of discovery. Chapman basses this tolling argument on the Ninth Circuit's opinion in Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir.1981). In that case, as Homco correctly notes, the summary judgment was reversed because a fact question existed as to when the plaintiff was informed of his discharge. In the instant case, no such fact issue remains open.

This Court's opinion in Merrill v. Southern Methodist University, 806 F.2d 600 (5th Cir. 1986), supports the conclusion that tolling is inapplicable under the facts of this case. In Merrill, this Court rejected the plaintiff's argument that the statute of limitation in a Title VII case should not begin to run until the date of discovery of the alleged discriminatory practices. We conclude that the reasoning behind Merrill is sufficiently analogous to the instant case to support the conclusion that tolling is inappropriate.

III. CONCLUSION

The district court did not err in concluding that Chapman's claim was time-barred. Because dismissal was proper on that ground alone, we do not address the alternative ground for dismissal. The judgment of the district court must be affirmed.

AFFIRMED.

APPENDIX C

MEMORANDUM

January 13, 1986

To: All Homco, Inc. Employees

Subject: Staff Change

Effective today Charles Chapman has resigned his position as Finishing Dept. supervisor.

Our best wishes are extended to Charles for the future.

For an interim period only, John Crego will act as Finishing Dept. supervisor.

RON KINNEY

/mm

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES F. CHAPMAN	§	FILED OCT 20, 1988
	§	BY: NANCY DOHERTY,
Plaintiff	§	CLERK
v.	§	CA3-88-0113-H
	§	
HOMCO, INC.,	§	
	§	
Defendant.	§	

PLAINTIFF'S AFFIDAVIT

STATE OF TEXAS §
§
CONTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Mr. Charles F. Chapman, who is personally known to me, and first being duly sworn according to law upon his oath deposed and said the following:

1. My name is Charles F. Chapman; I am over 18 yeas of age, I have never been convicted of a crime, and I am competent to make this Affidavit. I am the Plaintiff in the above-referenced cause and as such have personal knowledge of the facts stated herein and they are all true and correct.

2. I was informed of my termination on the 11th day of January, 1986, by Mr. Kinney with the reason that I did not fit in.

3. On January 13, 1986, Defendant posted a notice to the employees that I had resigned effective that day. I had not

resigned and I was never given the opportunity, nor did I ask for one. A copy of that letter is attached hereto as Exhibit A.

4. Defendant continued to pay me a full salary until March, 1986.

5. It was not until a few weeks had gone by and I discovered the letter of resignation and the fact that my replacement was so much younger that I came to believe I had been terminated because of my age.

Further affiant sayeth not.

_____

SIGNED BY CHARLES F. CHAPMAN

SUBSCRIBED AND SWORN TO BEFORE ME on this 20th day of October, 1988, to certify which witness my hand and official seal.

_____

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

My Commission Expires:

_____

MEMORANDUM

January 13, 1986

To: All Homco, Inc. Employees

Subject: Staff Change

Effective today Charles Chapman has resigned his position as Finishing Dept. supervisor.

Our best wishes are extended to Charles for the future.

For an interim period only, John Crego will act as Finishing Dept. supervisor.

RON KINNEY

/mm

EXHIBIT A

No. 89-1289

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES F. CHAPMAN

Petitioner

v.

HOMCO, INC.

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counsel for Respondent

COUNTERSTATEMENT OF QUESTION PRESENTED

From what date should the two year statute of limitations in the Age Discrimination in Employment Act of 1967 commence to run?

RULE 28.1 STATEMENT

Homco, Inc. is a wholly owned subsidiary of Home Interiors & Gifts, Inc. Other subsidiaries of Home Interiors & Gifts, Inc. are H.I. Service Enterprises, Inc., Dallas Mavericks, Inc., Dallas Woodcraft, Inc., GIA, Inc., H.I. Production Company, Inc., Moody-Day, Inc., Personal Way Aviation, Inc., Service Industries Property Management, Inc., Kosmeo Cosmetics, Inc., and Lady Love Cosmetics, Inc.,

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TABLE OF AUTHORITIES

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent, Homco, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case.

STATEMENT OF THE CASE

This is an action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34, in which Chapman alleges that Homco discharged him on January 11, 1986, because of his age. Chapman commenced this action on January 13, 1988, in the United States District for the Northern District of Texas. Chapman did not allege a willful violation of the ADEA.

On December 12, 1988, the District Court issued a Memorandum Opinion and Order which granted Homco's Motion for Summary Judgment and dismissed the case on alternative grounds. The District Court found that Chapman's action was barred by the ADEA's two year statute of limitations, 29 U.S.C. § 626(e)(1),[1] in that he was discharged on January 11, 1986, but had not filed suit until January 13, 1988. Alternatively, the District Court held that Chapman had failed to establish a genuine issue of material fact with respect to his claim of age discrimination.

A unanimous panel of the Fifth Circuit affirmed the District Court's decision in a *per curiam* opinion dated October 23, 1989. The Fifth Circuit stated: "There is no dispute that January 11, 1986, is the date of the termination as well as the date of the last alleged discrimination event" and that "Chapman filed his complaint on January 13, 1988, more than two years after the date that Chapman was notified of his discharge." Based upon these undisputed facts, the Fifth Circuit held that the District Court did not err in finding Chapman's action to be barred by the ADEA's statute of limitations. Because the Fifth Circuit concluded that dismissal of Chapman's claim was proper because it was time barred, the panel did not address the District Court's ruling on the merits of the action.

[1] 29 U.S.C. § 626(e)(1) adopts the statute of limitations set forth in the Portal-to-Portal Act, 29 U.S.C. § 255, which provides that an action "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

REASONS FOR DENYING WRIT

Chapman's petition appears to present two questions to this Court. Question 1, which is raised in the body of the petition and in the Counterstatement of Question Presented in this Brief, raises the issue of from what date should the ADEA's two year statute of limitations commence to run? The second question is the narrower Question Presented in the petition, and raises the issue of whether a subsequent discriminatory act by the employer after the date of termination of the employee should be the date for the statute of limitations to commence under the ADEA? As set forth below, neither of these questions warrant granting Chapman's petition.

QUESTION 1.

I. This Court has already determined the date upon which the ADEA's statute of limitations begins to run.

Chapman's petition asserts that the Fifth Circuit erred in finding that his cause of action under the ADEA accrued at the time he was notified of his discharge on January 11, 1986, rather than at an unspecified date three weeks later when he first became "aware that the termination was based upon discriminatory factors." Chapman urges that this latter date should control for purposes of commencing the limitations period under the ADEA, since Homco allegedly concealed its discriminatory intent when it notified him on January 11, 1986, that he was discharged.

The question of when the statute of limitations begins to run for purposes of employment discrimination claims, however, has already been answered by this Court. In *Delaware State College v. Ricks,* 449 U.S. 250 (1981), an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et.seq.,* this Court found that in order to determine the timeliness of a plaintiff's claim, a court must "identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 257. This Court noted

that the only discrimination alleged by Ricks was the denial of tenure as a professor and that such discrimination occurred at the time the tenure decision was made and communicated to him. *Id.* at 258. This Court thus held that the limitations period commenced to run when the tenure decision was made and Ricks was so notified. *Id.* at 258-59.

In reaching this finding, this Court rejected the suggestion that the limitations period actually began to run on the date when, as a result of the tenure decision, Ricks was eventually terminated. Since Ricks had complained only of the tenure decision, this Court found that it was "simply insufficient . . to allege", in order to start the limitations period on the later date, that the termination gave "present effect to the past illegal act" or that it "perpetrate[d] the consequences of forbidden discrimination." *Id.* at 259. This Court thus held that the date the tenure decision was communicated to Ricks started the limitations period even though one of the effects of the decision—the evenutal loss of employment—did not occur until later. *Id.*

Although *Ricks* was a Title VII case, its reasoning applies to all employment discrimination actions. This Court has applied the principle of *Ricks* to employment actions under 42 U.S.C. § 1981, *Ricks,* 449 U.S. at 263, and 42 U.S.C. § 1983, *Chardon v. Fernandez,* 454 U.S. 6 (1981). Since Title VII and the ADEA share the common purpose of eliminating discrimination in the workplace, the principle of *Ricks* logically extends to ADEA actions as well.[2] *See Oscar Meyer & Co. v. Evans,* 441 U.S. 750, 757 (1979). It was this similarity which led the Fifth Circuit below to

[2]In *Unexcelled Chemical Corporation v. United States,* 345 U.S. 59, 65 (1953), this Court was asked to determine when a cause of action accrues for purposes of commencing the limitations period under the Portal-to-Portal Act, 29 U.S.C. § 255.1. This Court noted the following: "A cause of action is created when there is a breach of duty owed the plaintiff." There is thus no substantive difference between the starting dates under this statute, as incorporated by 29 U.S.C. § 626(e)(1), and Title VII's limitations period.

regard *Ricks* as dispositive authority in finding that the limitations period under the ADEA began to run on the date Chapman was notified of his discharge. Chapman has not disputed the Fifth Circuit's application of *Ricks* to this action.

Chapman's petition thus asks this Court to address a question already decided by this Court. By urging this Court to hold that the ADEA limitations period began to run for Chapman on the date when he first believed that his discharge was discriminatory, Chapman is asking this court to consider, once again, whether a date other than the actual date that a plaintiff is notified of an alleged discriminatory decision may control for purposes of starting the limitations period. The ruling in *Ricks,* however, is dispositive of this question and, when applied to this case establishes that, contrary to Chapman's position, the limitations period began on the date he was notified that he was discharged. Inasmuch as Chapman has not articulated any reasons why *Ricks* should be reconsidered by this Court, his petition should be denied.

II. The decision below is not in conflict with the law of any other circuit.

Contrary to Chapman's petition, the decision of the Fifth Circuit below in rejecting his argument that the limitations period should have started when he allegedly discovered the discriminatory nature of his discharge is not in conflict with the Ninth Circuit's opinion in *Aronsen v. Crown Zellerbach,* 662 F.2d 584 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983). A careful reading of *Aronsen* distinguishes it from the facts which were before the Fifth Circuit below.

In *Aronsen,* the Ninth Circuit was not asked to determine when the ADEA's statute of limitations begins to run. Rather, the court was merely asked to determine on what date the alleged discriminatory act occurred. The defendant therein asserted that it informed plaintiff of his discharge on a certain date, but the

plaintiff specifically denied having been informed of his discharge on that date. *Aronsen,* 662 F.2d at 594. Hence, in *Aronsen,* unlike in the present case, the plaintiff raised a fact question as to when he was informed of his discharge. It was this fact question that caused the Ninth Circuit to find summary judgment inappropriate in *Aronsen.*

The Fifth Circuit, in fact, distinguished *Aronsen* on this very ground in the opinion below:

> In that case, as Homco correctly notes, the summary judgment was reversed because a fact question existed as to when the plaintiff was informed of his discharge. In the instant case, no such fact issue remains open.

Since Chapman has not otherwise demonstrated a conflict among the circuits with respect to Question 1, his petition should be denied.

III. Chapman's petition seeks to defeat the purpose of the ADEA's statute of limitations.

This Court has consistently recognized that time limitation provisions promote important interests: "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-4 (1975). In construing the limitations period involved in the present case, 29 U.S.C. § 626(e), the Court is thus constrained to uphold its purpose, which is to encourage the prompt presentation of claims. *See Campbell v. Haverhill,* 155 U.S. 610, 617 (1985).

Accepting Chapman's position that the ADEA's limitations period should start only when an employee decides that discrimination was the true reason for his discharge would effectively

defeat this provision. *See United States v. Kubrick,* 444 U.S. 111, 125-6 (1979). Under these circumstances, it is likely that tolling would attach in most cases. As noted in *Thornborough v. Columbus & Greenville Railroad Co.,* 760 F.2d 633, 638 (5th Cir. 1985): "Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job."

In the vast majority of cases, then, there would be no objective and certain means of determining when the limitations period begins to run. It might be years before a person may come to believe that an adverse employment related decision affecting the person was caused by illegal discrimination. More importantly, there would be no incentive for that person to investigate whether or not discrimination played any role in an adverse employment decision. In the meantime, the employer would remain vulnerable to suits based on these old acts. Since the foregoing result is plainly contrary to the purpose of 29 U.S.C. § 626(e), Chapman's petition should be denied.

QUESTION 2.

Neither the decision below nor the underlying record raises the Question Presented in the petition.

Chapman's petition asserts, for the first time in this proceeding, that Homco "continued the illegal act of discriminatory termination by falsely stating in its Memorandum to its other employees" on January 13, 1986, that he "had resigned his position." Chapman asserts that the statute of limitations therefore began to run on January 13, 1986, and not on January 11, 1986, the date he was notified of his discharge.

Neither the District Court nor the Fifth Circuit, however, addressed this assertion. The District Court, in its Memorandum Opinion and Order, noted only that Chapman's action arose from

his "discharge from employment on January 11, 1986", and did not mention any "subsequent discriminatory acts." Indeed, no such post discharge discriminatory acts were alleged in Chapman's Complaint or in his Response in Opposition to Homco's Motion for Summary Judgment.

The Fifth Circuit likewise addressed only the question of whether Chapman's termination claim was timely. In fact, as previously noted, the panel stated: "There is no dispute that January 11, 1986, is the date of the termination *as well as the date of the last alleged discrimination event.* [emphasis added]." The Fifth Circuit's finding on this point thus fully addressed the statute of limitations issues raised in Chapman's appellate brief.

In short, Chapman's petition plainly presents a question heretofore not raised in this proceeding or otherwise factually developed in the record. Inasmuch as this Court has routinely refused to consider issues raised for the first time on appeal or certiorari, *see E.E.O.C. v. Federal Labor Relations Authority,* 476 U.S. 19 (1986); *Delta Air Lines, Inc. v. August,* 450 U.S. 346 (1981); *Tennessee v. Dunlop,* 426 U.S. 312 (1976), writ should be denied to Chapman on this question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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